

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOHN ALLEN ALEXANDER et al.,

Plaintiffs,

Case No. 2:23-cv-6

v.

Honorable Maarten Vermaat

GRETCHEN WHITMER et al.,

Defendants.

OPINION

This is a civil rights action brought by two state prisoners under 42 U.S.C. § 1983. Plaintiffs have been granted leave to proceed *in forma pauperis*. (ECF No. 9.) Pursuant to 28 U.S.C. § 636(c) and Rule 73 of the Federal Rules of Civil Procedure, Plaintiffs consented to proceed in all matters in this action under the jurisdiction of a United States magistrate judge. (ECF Nos. 6, 7.)

This case is presently before the Court for preliminary review under the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (PLRA), pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b), and 42 U.S.C. § 1997e(c). The Court is required to conduct this initial review prior to the service of the complaint. *See In re Prison Litig. Reform Act*, 105 F.3d 1131, 1131, 1134 (6th Cir. 1997); *McGore v. Wrigglesworth*, 114 F.3d 601, 604–05 (6th Cir. 1997). Service of the complaint on the named defendants is of particular significance in defining a putative defendant’s relationship to the proceedings.

“An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court’s authority, by formal process.” *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999). “Service of process, under longstanding

tradition in our system of justice, is fundamental to any procedural imposition on a named defendant.” *Id.* at 350. “[O]ne becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend.” *Id.* (citations omitted). That is, “[u]nless a named defendant agrees to waive service, the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights.” *Id.* at 351. Therefore, the PLRA, by requiring courts to review and even resolve a plaintiff’s claims before service, creates a circumstance where there may only be one party to the proceeding—the plaintiff—at the district court level and on appeal. *See, e.g., Conway v. Fayette Cnty. Gov’t*, 212 F. App’x 418 (6th Cir. 2007) (“Pursuant to 28 U.S.C. § 1915A, the district court screened the complaint and dismissed it without prejudice before service was made upon any of the defendants . . . [such that] . . . only [the plaintiff] [wa]s a party to this appeal.”).

Here, Plaintiffs have consented to a United States magistrate judge conducting all proceedings in this case under 28 U.S.C. § 636(c). That statute provides that “[u]pon the consent of the parties, a full-time United States magistrate judge . . . may conduct any or all proceedings . . . and order the entry of judgment in the case . . .” 28 U.S.C. § 636(c). Because the named Defendants have not yet been served, the undersigned concludes that they are not presently parties whose consent is required to permit the undersigned to conduct a preliminary review under the PLRA, in the same way they are not parties who will be served with or given notice of this opinion. *See Neals v. Norwood*, 59 F.3d 530, 532 (5th Cir. 1995) (“The record does not contain a

consent from the defendants[; h]owever, because they had not been served, they were not parties to th[e] action at the time the magistrate entered judgment.”).¹

Under the PLRA, the Court is required to dismiss any prisoner action brought under federal law if the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant immune from such relief. 28 U.S.C. §§ 1915(e)(2), 1915A; 42 U.S.C. § 1997e(c). The Court must read Plaintiffs’ *pro se* complaint indulgently, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972), and accept Plaintiffs’ allegations as true, unless they are clearly irrational or wholly incredible. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). Applying these standards, the Court will dismiss Plaintiffs’ complaint for failure to state a claim. The Court will also deny Plaintiffs’ motion for class action certification. (ECF No. 3.)

Discussion

I. Factual Allegations

Plaintiffs are presently incarcerated with the Michigan Department of Corrections (MDOC) at the Kinross Correctional Facility (KCF) in Kincheloe, Chippewa County, Michigan. The events about which they complaint occurred at that facility. Plaintiffs sue Governor Gretchen

¹ But *see Coleman v. Lab. & Indus. Rev. Comm’n of Wis.*, 860 F.3d 461, 471 (7th Cir. 2017) (concluding that, when determining which parties are required to consent to proceed before a United States magistrate judge under 28 U.S.C. § 636(c), “context matters” and the context the United States Supreme Court considered in *Murphy Bros.* was nothing like the context of a screening dismissal pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b), and 42 U.S.C. § 1997e(c)); *Williams v. King*, 875 F.3d 500, 503–04 (9th Cir. 2017) (relying on Black’s Law Dictionary for the definition of “parties” and not addressing *Murphy Bros.*); *Burton v. Schamp*, 25 F.4th 198, 207 n.26 (3d Cir. 2022) (premising its discussion of “the term ‘parties’ solely in relation to its meaning in Section 636(c)(1), and . . . not tak[ing] an opinion on the meaning of ‘parties’ in other contexts”).

Whitmer and MDOC Director Heidi E. Washington. Plaintiffs sue Defendants in their official and personal capacities. (ECF No. 1, PageID.3.)

Plaintiffs are both serving life sentences. (*Id.*, PageID.4.) Their allegations are scant, but focus on the COVID-19 pandemic. Both Plaintiffs have had COVID-19 and “fear for [their lives] due to the negligence of [Defendants’] failure to reduce the overcrowding” in MDOC facilities. (ECF No. 1-1, PageID.8.) Inmates were told to “practice social distancing, wear masks, and maintain cleanliness.” (ECF No. 1, PageID.3.) Plaintiffs assert that the housing units at KCF were built to house 80 men, but that the MDOC has doubled the population to 160 men, with 8 men assigned to each cubicle. (*Id.*) According to Plaintiffs, having 8 men in each cubicle “makes it impossible for the practice of social distancing, and to maintain cleanliness[] and order.” (*Id.*)

When an inmate tests positive for COVID-19, he and the 7 other men assigned to his cubicle are “sent over to the education building where [beds have] been placed to [quarantine] the affected,” which has caused educational programming to be cancelled. (*Id.*) There are no showers in the education building. (*Id.*) Plaintiffs claim that building is not “equipped to handle the sick.” (*Id.*) Plaintiffs aver that Defendants “are aware of the overcrowded conditions, the shortage of staff who are being overworked with constant mandatory stay at work that comes from being understaffed, and unsanitary conditions from having too many men occupying an area.” (*Id.*)

Plaintiffs claim that inmates are “too close together to do anything.” (*Id.*) They stated that 80 men share 3 showers, 7 sinks, and 4 toilets. (*Id.*) Plaintiffs claim that the activity rooms are over capacity, but that the fire inspector keeps “passing these unit inspections knowing that the State of Michigan is in violation.” (*Id.*, PageID.3–4.) Plaintiffs “fear death” because of “the constant outbreak of COVID-19 cases, and staff working while they are sick.” (*Id.*, PageID.4.)

Based on the foregoing, Plaintiffs assert violations of their Fifth, Eighth, and Fourteenth Amendment rights, as well as their rights under Article I, Section 16 of the Michigan Constitution. (*Id.*) Plaintiffs seek injunctive relief in the form of an order directing the MDOC to “reduc[e] eight man cubicles to four, and two man rooms to one in the Level Two facilities that are double bunked.” (*Id.*)

II. Motion for Class Action Certification

Plaintiffs seek class action certification, contending that their complaint “affects a great number of prisoners who [have] served a great number of years before the illegal and unconstitutional violation of COVID-19 protocol violations took place.” (ECF No. 3, PageID.18.) Plaintiffs aver that the class “is so numerous that joinder of all members is impracticable.” (*Id.*)

The purposes of class action suits are judicial economy and the opportunity to bring claims that would not be brought absent the class action because it might not be economically feasible to bring them as individual claims. *See Reeb v. Ohio Dep’t of Rehab. & Corr.*, 435 F.3d 639, 650 (6th Cir. 2006). Federal Rule of Civil Procedure 23, which governs class certification, provides that:

One or more members of a class may sue . . . as representative parties on behalf of all only if (1) the class is so numerous that joinder . . . is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The four prerequisites for class certification are respectively referred to as “numerosity, commonality, typicality, and adequacy of representation.” *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010); *see also Daffin v. Ford Motor Co.*, 458 F.3d 549 (6th Cir. 2006).

Thus, for a case to proceed as a class action, the Court must be satisfied on the grounds enumerated above, including the adequacy of class representation. *See* Fed. R. Civ. P. 23(a)(4). Plaintiffs bear the burden of establishing the right to class certification. *See In re Am. Med. Sys.*, 75 F.3d 1069, 1086 (6th Cir. 1996).

It is well established that *pro se* litigants are “inadequate class representatives.” *Garrison v. Mich. Dep’t of Corr.*, 333 F. App’x 914, 919 (6th Cir. 2009) (citations omitted); *Ziegler v. Michigan*, 59 F. App’x 622, 624 (6th Cir. 2003) (recognizing that “[g]enerally *pro se* prisoners cannot adequately represent a class” (citing *Fymbo v. State Farm & Cas. Co.*, 213 F.3d 1320, 1321 (10th Cir. 2000))); *Dodson v. Wilkinson*, 304 F. App’x 434, 438 (6th Cir. 2008) (recognizing that “[p]*ro se* prisoners generally may not bring class action lawsuits concerning prison conditions” (citing *Dean v. Blanchard*, 865 F.2d 257 (6th Cir. 1988) (table); *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975))); *Palasty v. Hawk*, 15 F. App’x 197, 200 (6th Cir. 2001) (concluding that “*pro se* prisoners are not able to represent fairly [a] class” (citing *Fymbo*, 213 F.3d at 1321; *Oxendine*, 509 F.2d at 1407)); *Marr v. Michigan*, No. 95-1794, 1996 WL 205582, at *1 (6th Cir. Apr. 25, 1996) (noting that “an imprisoned litigant who is not represented by counsel may not represent a class of inmates because the prisoner cannot adequately represent the interests of the class” (citing *Oxendine*, 509 F.2d at 1407)). Because Plaintiffs are incarcerated *pro se* litigants, the Court finds that they are not appropriate representatives of a class. Plaintiffs’ motion for class action certification (ECF No. 3) will, therefore, be denied.

III. Failure to State a Claim

A complaint may be dismissed for failure to state a claim if it fails “to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While a complaint need not contain detailed factual allegations, a plaintiff’s allegations must include more than labels

and conclusions. *Id.*; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”). The court must determine whether the complaint contains “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 679. Although the plausibility standard is not equivalent to a “‘probability requirement,’ . . . it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* at 678 (quoting *Twombly*, 550 U.S. at 556). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the pleader is entitled to relief.” *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)); *see also Hill v. Lappin*, 630 F.3d 468, 470–71 (6th Cir. 2010) (holding that the *Twombly/Iqbal* plausibility standard applies to dismissals of prisoner cases on initial review under 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2)(B)(ii)).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the federal Constitution or laws and must show that the deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996). Because § 1983 is a method for vindicating federal rights, not a source of substantive rights itself, the first step in an action under § 1983 is to identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

A. Fifth and Fourteenth Amendment Claims

Plaintiffs contend that Defendants’ actions (or inactions) have violated their Fifth Amendment rights. Plaintiffs presumably intend to assert a Fifth Amendment due process claim. The Fifth Amendment’s Due Process Clause, however, applies only to claims against federal

employees. Here, Plaintiffs have sued state employees—Governor Whitmer and MDOC Director Washington. Plaintiffs, therefore, cannot maintain their Fifth Amendment due process claims, and such claims will be dismissed. *See, e.g., Scott v. Clay Cnty., Tenn.*, 205 F.3d 867, 873 n.8 (6th Cir. 2000) (noting that “[t]he Fourteenth Amendment’s Due Process Clause restricts the activities of the states and their instrumentalities; whereas the Fifth Amendment’s Due Process Clause circumscribes only the actions of the federal government”).

Plaintiffs also assert that Defendants’ actions (or inactions) have violated their rights under the Fourteenth Amendment. The Court construes Plaintiffs to be asserting a Fourteenth Amendment substantive due process claim. “Substantive due process ‘prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty.’” *Prater v. City of Burnside*, 289 F.3d 417, 431 (6th Cir. 2002) (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)). “Conduct shocks the conscience if it ‘violates the decencies of civilized conduct.’” *Range v. Douglas*, 763 F.3d 573, 589 (6th Cir. 2014) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998)).

However, “[w]here a particular [a]mendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that [a]mendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.’” *Albright v. Oliver*, 510 U.S. 266, 273–75 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 394 (1989)) (holding that the Fourth Amendment, not substantive due process, provides the standard for analyzing claims involving unreasonable search or seizure of free citizens). If such an amendment exists, the substantive due process claim is properly dismissed. *See Heike v. Guevara*, 519 F. App’x 911, 923 (6th Cir. 2013). In this case, the Eighth Amendment applies to Plaintiffs’ claim for relief concerning the COVID-19 pandemic and the inability to social distance at KCF.

Consequently, any intended Fourteenth Amendment substantive due process claim will be dismissed.

B. Eighth Amendment Claims

Plaintiffs contend that Defendants have violated their Eighth Amendment rights by not adequately responding to the COVID-19 pandemic. Plaintiffs suggest that they are unable to social distance at KCF because 8 men are assigned to a cubicle and because every group of 80 men must share 3 showers, 7 sinks, and 4 toilets. (ECF No. 1, PageID.3.) Plaintiffs also allege that individuals who test positive for COVID-19 are moved to the education building, which is not “equipped to handle the sick.” (*Id.*) Plaintiffs also vaguely state that staff work “while they are sick.” (*Id.*, PageID.4.) Plaintiffs claim that Defendants’ actions (or inactions) amount to cruel and unusual punishment because Plaintiffs “fear death.” (*Id.*)

As noted above, Plaintiffs have sued Defendants in their official and personal capacities, and seek only injunctive relief in the form of an order directing the MDOC to “reduc[e] eight man cubicles to four, and two man rooms to one in the Level Two facilities that are double bunked.” (*Id.*) A suit against an individual in his or her official capacity is equivalent to a suit against the governmental entity; in this case, the State of Michigan and the MDOC. *See Will v. Mich. Dept of State Police*, 491 U.S. 58, 71 (1989); *Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir. 1994). The states and their departments are immune under the Eleventh Amendment from suit in the federal courts, unless the state has waived immunity or Congress has expressly abrogated Eleventh Amendment immunity by statute. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98–101 (1984); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978); *O’Hara v. Wigginton*, 24 F.3d 823, 826 (6th Cir. 1994). Official capacity actions seeking injunctive relief, however, constitute an exception to sovereign immunity. *See Ex Parte Young*, 209 U.S. 123, 159–60 (1908) (holding that the Eleventh Amendment immunity does not bar prospective injunctive relief against a state

official). The United States Supreme Court has determined that a suit under *Ex Parte Young* for prospective injunctive relief should not be treated as an action against the state. *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985). Instead, the doctrine is a fiction recognizing that unconstitutional acts cannot have been authorized by the state and therefore cannot be considered done under the state’s authority. *Id.*

Importantly, “*Ex parte Young* can only be used to avoid a state’s sovereign immunity when a ‘complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.’” *Ladd v. Marchbanks*, 971 F.3d 574, 581 (6th Cir. 2020) (quoting *Verizon Md. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 645 (2002)). Injunctive relief, however, is appropriate only where a plaintiff can show a reasonable expectation or demonstrated probability that he is in immediate danger of sustaining direct future injury as the *result* of the challenged official conduct. *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). Past exposure to an isolated incident of illegal conduct does not, by itself, sufficiently prove that the plaintiff will be subjected to the illegal conduct again. *See, e.g., id.*; *Alvarez v. City of Chicago*, 649 F. Supp. 43 (N.D. Ill. 1986); *Bruscino v. Carlson*, 654 F. Supp. 609, 614, 618 (S.D. Ill. 1987), *aff’d*, 854 F.2d 162 (7th Cir. 1988); *O’Shea v. Littleton*, 414 U.S. 488, 495–96 (1974). Plaintiffs’ complaint suggests an ongoing violation against Defendants because they suggest that there is a “constant outbreak of COVID-19 cases” at KCF. (ECF No. 1, PageID.4.) Nevertheless, for the reasons set forth below, Plaintiffs fail to state a viable Eighth Amendment claim against Defendants.

The Eighth Amendment imposes a constitutional limitation on the power of the states to punish those convicted of crimes. Punishment may not be “barbarous,” nor may it contravene society’s “evolving standards of decency.” *Rhodes v. Chapman*, 452 U.S. 337, 345–46 (1981). The Eighth Amendment, therefore, prohibits conduct by prison officials that involves the “unnecessary

and wanton infliction of pain.” *Ivey v. Wilson*, 832 F.2d 950, 954 (6th Cir. 1987) (per curiam) (quoting *Rhodes*, 452 U.S. at 346). The deprivation alleged must result in the denial of the “minimal civilized measure of life’s necessities.” *Rhodes*, 452 U.S. at 347; *see also Wilson v. Yaklich*, 148 F.3d 596, 600–01 (6th Cir. 1998). The Eighth Amendment is only concerned with “deprivations of essential food, medical care, or sanitation” or “other conditions intolerable for prison confinement.” *Rhodes*, 452 U.S. at 348 (citation omitted). Moreover, “[n]ot every unpleasant experience a prisoner might endure while incarcerated constitutes cruel and unusual punishment within the meaning of the Eighth Amendment.” *Ivey*, 832 F.2d at 954.

In order for a prisoner to prevail on an Eighth Amendment claim, the prisoner must show that he faced a sufficiently serious risk to his health or safety and that Defendants acted with “‘deliberate indifference’ to inmate health or safety.” *Mingus v. Butler*, 591 F.3d 474, 479–80 (6th Cir. 2010) (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)) (applying deliberate indifference standard to medical claims); *see also Helling v. McKinney*, 509 U.S. 25, 35 (1993) (applying deliberate indifference standard to conditions of confinement claims). The deliberate indifference standard includes both objective and subjective components. *Farmer*, 511 U.S. at 834; *Helling*, 509 U.S. at 35–37. To satisfy the objective prong, an inmate must show “that he is incarcerated under conditions posing a substantial risk of serious harm.” *Farmer*, 511 U.S. at 834. Under the subjective prong, an official must “know[] of and disregard[] an excessive risk to inmate health or safety.” *Id.* at 837. “[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted.” *Id.* at 844.

1. Objective Prong

Here, Plaintiffs contend that conditions at KCF place them at risk of contracting COVID-19 again. In a 2020 case brought by federal prisoners under 28 U.S.C. § 2241, the United States

Court of Appeals for the Sixth Circuit addressed the issue of whether the Bureau of Prisons (BOP) violated the Eighth Amendment rights of medically vulnerable inmates at the Elkton Federal Correctional Institution by failing to adequately protect them from COVID-19 infection. *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020). In the opinion, the Sixth Circuit found that the plaintiffs in *Wilson* had easily satisfied the objective component of an Eighth Amendment claim:

The COVID-19 virus creates a substantial risk of serious harm leading to pneumonia, respiratory failure, or death. The BOP acknowledges that “[t]he health risks posed by COVID-19 are significant.” CA6 R. 35, Appellant Br., PageID 42. The infection and fatality rates at Elkton have borne out the serious risk of COVID-19, despite the BOP’s efforts. The transmissibility of the COVID-19 virus in conjunction with Elkton’s dormitory-style housing—which places inmates within feet of each other—and the medically-vulnerable subclass’s health risks, presents a substantial risk that petitioners at Elkton will be infected with COVID-19 and have serious health effects as a result, including, and up to, death. Petitioners have put forth sufficient evidence that they are “incarcerated under conditions posing a substantial risk of serious harm.” *Farmer*, 511 U.S. at 834.

Id. at 840.

Under that precedent, a medically vulnerable plaintiff may satisfy the objective prong by alleging conditions that could facilitate COVID-19 transmission within a prison and the health risks posed by the virus. In this case, Plaintiffs allege conditions that could facilitate COVID-19 transmission within KCF, but Plaintiffs do not specifically allege that they suffer from conditions that make them medically vulnerable. Nonetheless, at this early stage, the Court concludes that Plaintiffs have alleged facts sufficient to satisfy the objective prong of the deliberate indifference test.

2. Subjective Prong

Notwithstanding Plaintiffs’ ability to satisfy the objective prong, they fail to allege facts sufficient to satisfy the subjective prong of the deliberate indifference test. The Sixth Circuit went on in *Wilson* to address the subjective prong of an Eighth Amendment claim, noting that the

pertinent question was whether the BOP's actions demonstrated deliberate indifference to the serious risk of harm posed by COVID-19 in the prison:

There is no question that the BOP was aware of and understood the potential risk of serious harm to inmates at Elkton through exposure to the COVID-19 virus. As of April 22, fifty-nine inmates and forty-six staff members tested positive for COVID-19, and six inmates had died. "We may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious." *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). The BOP acknowledged the risk from COVID-19 and implemented a six-phase plan to mitigate the risk of COVID-19 spreading at Elkton.

The key inquiry is whether the BOP "responded reasonably to th[is] risk." *Farmer*, 511 U.S. at 844. The BOP contends that it has acted "assiduously to protect inmates from the risks of COVID-19, to the extent possible." CA6 R. 35, Appellant Br., PageID 42. These actions include implement[ing] measures to screen inmates for the virus; isolat[ing] and quarantin[ing] inmates who may have contracted the virus; limit[ing] inmates' movement from their residential areas and otherwise limit[ing] group gatherings; conduct[ing] testing in accordance with CDC guidance; limit[ing] staff and visitors and subject[ing] them to enhanced screening; clean[ing] common areas and giv[ing] inmates disinfectant to clean their cells; provid[ing] inmates continuous access to sinks, water, and soap; educat[ing] staff and inmates about ways to avoid contracting and transmitting the virus; and provid[ing] masks to inmates and various other personal protective equipment to staff. *Id.* at 42–43.

The BOP argues that these actions show it has responded reasonably to the risk posed by COVID-19 and that the conditions at Elkton cannot be found to violate the Eighth Amendment. We agree.

Here, while the harm imposed by COVID-19 on inmates at Elkton "ultimately [is] not averted," the BOP has "responded reasonably to the risk" and therefore has not been deliberately indifferent to the inmates' Eighth Amendment rights. *Farmer*, 511 U.S. at 844. The BOP implemented a six-phase action plan to reduce the risk of COVID-19 spread at Elkton. Before the district court granted the preliminary injunction at issue, the BOP took preventative measures, including screening for symptoms, educating staff and inmates about COVID-19, cancelling visitation, quarantining new inmates, implementing regular cleaning, providing disinfectant supplies, and providing masks. The BOP initially struggled to scale up its testing capacity just before the district court issued the preliminary injunction, but even there the BOP represented that it was on the cusp of expanding testing. The BOP's efforts to expand testing demonstrate the opposite of a disregard of a serious health risk.

Wilson, 961 F.3d at 840–41.

In its decision, the Sixth Circuit recognized that other Sixth Circuit decisions have found similar responses by prison officials and medical personnel, such as cleaning cells, quarantining infected inmates, and distributing information about a disease in an effort to prevent spread, to be reasonable. *Id.* at 841 (citing *Wooler v. Hickman Cnty.*, 377 F. App'x 502, 506 (6th Cir. 2010); *Rouster v. Cnty. of Saginaw*, 749 F.3d 437, 448–49 (6th Cir. 2014); *Harrison v. Ash*, 539 F.3d 510, 519–20 (6th Cir. 2008); *Rhinehart v. Scutt*, 894 F.3d 721, 740 (6th Cir. 2018)). The *Wilson* Court also noted that other circuits had concluded that similar actions by prison officials demonstrated a reasonable response to the risk posed by COVID-19:

In *Swain [v. Junior]*, the Eleventh Circuit granted a stay of a preliminary injunction pending appeal on state inmates' Eighth Amendment claims. 958 F.3d [1081,] 1085 [(11th Cir. 2020) (per curiam)]. The Eleventh Circuit held that “the inability to take a positive action likely does not constitute ‘a state of mind more blameworthy than negligence,’” and “the evidence supports that [Metro West Detention Center (“MWDC”)] is taking the risk of COVID-19 seriously.” *Id.* at 1088–90 (citation omitted). In response to the pandemic in early March, MWDC began “cancelling inmate visitation; screening arrestees, inmates, and staff; and advising staff of use of protective equipment and sanitation practices” and, after reviewing further CDC guidance, began “daily temperature screenings of all persons entering Metro West, establish[ed] a ‘COVID-19 Incident Command Center and Response Line’ to track testing and identify close contacts with the virus, develop[ed] a social hygiene campaign, and mandate[d] that staff and inmates wear protective masks at all times.” *Id.* at 1085–86. The Eleventh Circuit held that, because MWDC “adopted extensive safety measures such as increasing screening, providing protective equipment, adopting [physical] distancing when possible, quarantining symptomatic inmates, and enhancing cleaning procedures,” MWDC’s actions likely did not amount to deliberate indifference. *Id.* at 1090.

Similarly, the Fifth Circuit granted stays of two preliminary injunctions in *Valentine [v. Collier]*, 956 F.3d 797 (5th Cir. 2020) (per curiam), and *Marlowe [v. LeBlanc]*, No. 20-30276, 2020 WL 2043425 (5th Cir. Apr. 27, 2020) (per curiam). In *Valentine*, inmates at Texas’s Wallace Pack Unit filed a class action suit against the Texas Department of Criminal Justice (“TDCJ”) alleging violations of the Eighth Amendment. 956 F.3d at 799. In response to the COVID-19 pandemic, TDCJ had taken preventative measures such as providing “access to soap, tissues, –gloves, [and] masks,” implementing “regular cleaning,” “quarantin[ing] of new prisoners,” and ensuring “[physical] distancing during transport.” *Id.* at 802. The Fifth Circuit determined that the district court applied the wrong legal standard by “collaps[ing] the objective and subjective components of the Eighth Amendment inquiry” by “treating inadequate measures as dispositive of the Defendants’ mental

state” under the subjective prong and held that “accounting for the protective measures TDCJ has taken” the plaintiffs had not shown deliberate indifference. *Id.* at 802–03. In *Marlowe*, the Fifth Circuit relied on its reasoning in *Valentine* and again reiterated that there was “little basis for concluding that [the correctional center’s] mitigation efforts,” which included “providing prisoners with disinfectant spray and two cloth masks[,] . . . limiting the number of prisoners in the infirmary lobby[,] and painting markers on walkways to promote [physical] distancing,” were insufficient. 2020 WL 2043425, at *2–3.

Id. at 841–42. After reviewing the cases, the *Wilson* Court held that even if the BOP’s response to COVID-19 was inadequate, it took many affirmative actions, not only to treat and quarantine inmates who had tested positive, but also to prevent widespread transmission of COVID-19. The court held that because the BOP had neither disregarded a known risk nor failed to take steps to address the risk, it did not act with deliberate indifference in violation of the Eighth Amendment. *Id.* at 843–44.

In addition, in *Cameron v. Bouchard*, 818 F. App’x 393 (6th Cir. 2020), the Court relied on *Wilson* to find that pretrial detainees in the Oakland County Jail were unlikely to succeed on the merits of their Eighth and Fourteenth Amendment claims. The plaintiffs in *Cameron* claimed that jail officials were deliberately indifferent to the substantial risk of harm posed by COVID-19 at the jail. The district court initially granted a preliminary injunction requiring the defendants to “(1) provide all [j]ail inmates with access to certain protective measures and medical care intended to limit exposure, limit transmission, and/or treat COVID-19, and (2) provide the district court and Plaintiffs’ counsel with a list of medically vulnerable inmates within three business days.” *Id.* at 394. However, following the decision in *Wilson*, the Court granted the defendants’ renewed emergency motion to stay the preliminary injunction, finding that the preventative measures taken by the defendants were similar to those taken by officials in *Wilson* and, thus, were a reasonable response to the threat posed by COVID-19 to the plaintiffs. *Id.* at 395. Subsequently, in an

unpublished opinion issued on July 9, 2020, the Sixth Circuit vacated the injunction. *Cameron v. Bouchard*, 815 F. App'x 978 (6th Cir. 2020).

More recently, the Sixth Circuit affirmed this Court's dismissal of a claim similar to the one asserted by Plaintiffs:

Dykes-Bey alleges that the defendants were deliberately indifferent to the serious risk of harm posed by COVID-19. A deliberate-indifference claim under the Eighth Amendment includes both an objective and a subjective prong: (1) the inmate "is incarcerated under conditions posing a substantial risk of serious harm," and (2) "the official knows of and disregards an excessive risk to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994).

As we recognized in *Wilson v. Williams*, 961 F.3d 829, 840 (6th Cir. 2020), "the objective prong is easily satisfied" in this context. "The COVID-19 virus creates a substantial risk of serious harm leading to pneumonia, respiratory failure, or death." *Id.* "The transmissibility of the COVID-19 virus in conjunction with [a prison's] dormitory-style housing—which places inmates within feet of each other—and [an inmate's] health risks, presents a substantial risk that [an inmate] will be infected with COVID-19 and have serious health effects as a result, including, and up to, death." *Id.* The objective prong is met here.

The subjective prong, on the other hand, generally requires alleging at least that the defendant "acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id.* (quoting *Farmer*, 511 U.S. at 842). "The official must have a subjective 'state of mind more blameworthy than negligence,' akin to criminal recklessness." *Cameron v. Bouchard*, 815 F. Appx 978, 984 (6th Cir. 2020) (quoting *Farmer*, 511 U.S. at 835). As relevant here, "[t]he key inquiry is whether the [defendants] 'responded reasonably to the risk' ... posed by COVID-19." *Wilson*, 961 F.3d at 840–41 (quoting *Farmer*, 511 U.S. at 844) (alterations added and omitted). And a response may be reasonable even if "the harm imposed by COVID-19 on inmates . . . 'ultimately [is] not averted.'" *Id.* at 841 (quoting *Farmer*, 511 U.S. at 844).

Dykes-Bey fails to satisfy the subjective prong. He alleges that the defendants, knowing of the harm posed by COVID-19, acted with deliberate indifference by not providing KCF's inmates with the necessary means to practice social distancing. But Dykes-Bey's complaint does not allege any facts indicating that the defendants were deliberately indifferent to him or any other plaintiff. The complaint does not allege, for example, that KCF had enough physical space to implement social distancing, and that the defendants deliberately chose not to use that space. *Cf. Cameron*, 815 F. App'x at 986 (concluding that the plaintiffs failed to produce evidence showing that the defendants let empty prison cells go unused). Nor does it allege that the defendants knowingly housed COVID-19-positive inmates alongside any plaintiff, or even that a COVID-19 outbreak occurred in KCF.

Dykes-Bey's allegations about the lack of social distancing, therefore, do not establish deliberate indifference.

Moreover, Dykes-Bey's focus on social distancing ignores the "key inquiry" in these cases—whether the defendants "'responded reasonably to the risk' . . . posed by COVID-19." *Wilson*, 961 F.3d at 840–41 (citation omitted). To that end, Dykes-Bey's own allegations establish that the defendants acted reasonably. The complaint recognizes, for example, that the defendants screened employees daily for COVID-19 symptoms, provided masks to inmates, required correctional officers to wear masks (although some unnamed officers allegedly did not wear them properly), and provided bleach-based disinfectant in every communal bathroom. In other words, Dykes-Bey's complaint acknowledges that the defendants took affirmative steps to mitigate COVID-19's risks. Although he argues that those steps would ultimately be insufficient to stop an outbreak, whether these steps were sufficient matters less than what they say about the defendants' states of mind. *Id.* at 841 (noting that defendants may have responded reasonably even if the "harm imposed by COVID-19 on inmates . . . 'ultimately [is] not averted'" (quoting *Farmer*, 551 U.S. at 844)). That is, what matters is whether the precautionary steps taken show that the defendants responded reasonably to the risks of COVID-19. Here, as in *Wilson*, they do. *See, e.g., id.* at 840–41 (finding that similar measures amounted to a reasonable response). In short, these allegations defeat the subjective prong and thus his deliberate indifference claim.

The district court concluded that the defendants were not deliberately indifferent, but it relied on materials outside the record—official sanitation and hygiene policies adopted by the MDOC, reports of confirmed COVID-19 cases at KCF, and an MDOC press release—to reach this conclusion. *See* R. 36, Page ID# 281. Even if its consideration of those materials was improper, we may affirm on any basis supported by the record. *See Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002). As stated, Dykes-Bey's own allegations suffice to show that the defendants did not disregard the risks of COVID-19. Therefore, we affirm the district court's judgment on those grounds.

Dykes-Bey v. Washington, No. 21-1260, 2021 WL 7540173, at *2–3 (6th Cir. Oct. 14, 2021) (footnote omitted).

Here, like in *Dykes-Bey*, Plaintiffs fail to sufficiently allege that Defendants have shown deliberate indifference to the risk posed by COVID-19. Prisoners inherently "face social distancing challenges distinct from those of the general public (although perhaps not entirely unlike students in dorm rooms, individuals in medical and assisted care facilities, and even residents of densely occupied apartment complexes)." *United States v. Lemons*, 15 F.4th 747, 751 (6th Cir. 2021).

Plaintiffs' complaint, however, is devoid of facts suggesting that KCF "ha[s] enough physical space to implement social distancing, and that the defendants deliberately chose not to use that space." *Dykes-Bey*, 2021 WL 7540173, at *3. Moreover, in 2023, COVID-19 does not pose nearly the risk to individuals that it did in 2020 and 2021. "[W]ith access to the vaccine, an inmate larges faces the same risk from COVID-19 as those who are incarcerated," and such risks are "significantly reduce[d]." *See id.* Moreover, Plaintiffs recognize that the MDOC took steps to address the COVID-19 pandemic, including telling inmates to wear masks and maintain cleanliness. (ECF No. 1, PageID.3.) Plaintiffs' vague assertions that staff members "work[] while they are sick" and that it is impossible to "maintain cleanliness[] and order" are simply too conclusory to suggest any deliberate indifference on the part of Defendants.

The Court is sympathetic to Plaintiffs' concerns about the COVID-19 virus. However, their factual allegations are too scarce to show deliberate indifference. Plaintiffs must plead enough factual content for the Court to draw a reasonable inference that Defendants continue to be deliberately indifferent to the risks posed by COVID-19 and, therefore, are in violation of the Eighth Amendment such that the requested injunctive relief would be warranted. *See Iqbal*, 556 U.S. at 679. Plaintiffs have not done so here. Their complaint is insufficient to show a reasonable expectation or demonstrated probability that Plaintiffs are in immediate danger of sustaining direct future injury such that injunctive relief is warranted. *See Lyons*, 461 U.S. at 102. The Court, therefore, will dismiss Plaintiffs' Eighth Amendment claims against Defendants.

C. Violations of the Michigan Constitution

Finally, Plaintiffs assert that Defendants' actions (or inactions) violated their rights under Article I, Section 16 of the Michigan Constitution, which provides: "Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained." *See Mich. Const. art. I, § 16. Section 1983*,

however, does not provide redress for violations of state law. *See Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995); *Sweeton v. Brown*, 27 F.3d 1162, 1166 (6th Cir. 1994). Plaintiffs' allegation that Defendants violated the Michigan Constitution, therefore, fails to raise a cognizable federal constitutional claim.

Plaintiffs may be seeking to invoke this Court's supplemental jurisdiction over their state law claim for violations of the Michigan Constitution. Ordinarily, where a district court has exercised jurisdiction over a state law claim solely by virtue of supplemental jurisdiction and the federal claims are dismissed prior to trial, the court will dismiss the remaining state law claims. *See Experimental Holdings, Inc. v. Farris* 503 F.3d 514, 521 (6th Cir. 2007) ("Generally, once a federal court has dismissed a plaintiff's federal law claim, it should not reach state law claims." (citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966))); *Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1182 (6th Cir. 1993). In determining whether to retain supplemental jurisdiction, "[a] district court should consider the interests of judicial economy and the avoidance of multiplicity of litigation and balance those interests against needlessly deciding state law issues." *Landefeld*, 994 F.2d at 1182; *see also Moon v. Harrison Piping Supply*, 465 F.3d 719, 728 (6th Cir. 2006) ("Residual jurisdiction should be exercised only in cases where the interests of judicial economy and the avoidance of multiplicity of litigation outweigh our concern over needlessly deciding state law issues." (internal quotations omitted)). Dismissal, however, remains "purely discretionary." *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (citing 28 U.S.C. § 1367(c)); *Orton v. Johnny's Lunch Franchise, LLC*, 668 F.3d 843, 850 (6th Cir. 2012).

Here, the balance of the relevant considerations weighs against the exercise of supplemental jurisdiction because all of Plaintiffs' federal claims have been dismissed.

Accordingly, the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claim pursuant to the Michigan Constitution, and such claim will be dismissed without prejudice.

Conclusion

Having conducted the review required by the Prison Litigation Reform Act, the Court determines that Plaintiffs' federal claims will be dismissed for failure to state a claim, under 28 U.S.C. §§ 1915(e)(2) and 1915A(b), and 42 U.S.C. § 1997e(c). Plaintiffs' state law claim premised upon violations of the Michigan Constitution will be dismissed without prejudice because the Court declines to exercise supplemental jurisdiction over such claim. The Court will also deny Plaintiffs' motion for class action certification. (ECF No. 3.)

The Court must next decide whether an appeal of this action would be in good faith within the meaning of 28 U.S.C. § 1915(a)(3). *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997). Although the Court concludes that Plaintiffs' claims are properly dismissed, the Court does not conclude that any issue Plaintiffs might raise on appeal would be frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962). Accordingly, the Court does not certify that an appeal would not be taken in good faith. Should Plaintiffs appeal this decision, the Court will assess the \$505.00 appellate filing fee pursuant to § 1915(b)(1), *see McGore*, 114 F.3d at 610–11, unless either Plaintiff is barred from proceeding *in forma pauperis*, *e.g.*, by the “three-strikes” rule of § 1915(g). If a Plaintiff is barred by the “three-strikes” rule of § 1915(g), he will be required to pay his proportionate share of the \$505.00 appellate filing fee in one lump sum.

This is a dismissal as described by 28 U.S.C. § 1915(g).

An order and judgment consistent with this opinion will be entered.

Dated: March 17, 2023

/s/ *Maarten Vermaat*

Maarten Vermaat
United States Magistrate Judge